IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 10-0084

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST,

Appellant and Third-Party Respondent,

v.

SHELLY WEIDOW,

Appellee and Petitioner,

v.

UNINSURED EMPLOYERS' FUND,

Appellee and Respondent/Third-Party Petitioner.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Workers' Compensation Court,
The Honorable James Jeremiah Shea
Cause No. WCC No. 2007-1863

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The issues presented on this appeal are straightforward and purely legal in nature. Appellee Weidow's attempts to prejudice this Court against Bradley Howard personally and the Howard Family 1995 Trust (collectively "Howard") by coloring him as a wealthy, out-of-state, law-breaker are improper, unnecessarily inflammatory and not determinative of the issues on appeal. The first and primary issue is a matter of jurisdiction: Whether Weidow's undisputed failure to file his appeal to the Worker's Compensation Court ("WCC") within the statutory time period of 60 days after the mailing of the mediator's report can be excused due to some statutory infirmity. The Court can and should decide this appeal on this issue alone. The second issue presented requires a review of the WCC's application of the facts and circumstances of this case to the law: Whether the WCC properly construed the law regarding casual employment, as set forth in *Colmore v. UEF*, 2005 MT 239, 328 Mont. 441, 121 P.3d 1007, and whether the facts here provide "substantial credible evidence" to support the WCC's conclusion that Weidow's injury did not fall under the "casual employment" exception to worker's compensation coverage.

As an initial matter, § 39-71-520, MCA (2005), is neither unconstitutionally vague, as the WCC found it to be, nor ambiguous and therefore void, as Weidow argues in his Response Brief. Preliminarily, Howard has not raised any "new

issues" in his appeal. The arguments contained in Howard's Opening Brief were all either raised by the UEF in its briefing to the WCC or arise from the WCC's reasoning within its December 31, 2008 Order holding § 39-71-520, MCA (2005) unconstitutionally vague. Accordingly, this appeal does not raise new issues the WCC "'was never given the opportunity to consider.'" *See Molnar v. Montana Public Svc. Comm'n*, 2008 MT 49, ¶ 11, 341 Mont. 420, 117 P.3d 1048 (citation omitted). As the arguments set forth in Howard's Opening Brief make clear, the WCC decided wrongly when it held § 39-71-520, MCA (2005) was unconstitutionally vague. The plain language of the statute is constitutionally clear and unambiguous, and the interpretation of the statute's "determination by the department" language as meaning the determination by the UEF, and not the mediator's recommendation, is the most reasonable interpretation. Therefore, the statute passes constitutional muster, and Weidow's filing with the WCC was untimely and must be dismissed for lack of jurisdiction. *See Colmore*, ¶ 39.

Moreover, § 39-71-520(2) is not ambiguous. When the statute is examined in its entirety, subsection (2)'s use of the phrase "determination by the department" clearly could mean only the UEF's initial determination. While Howard believes a resort to the legislative history is unnecessary and improper, the scant legislative history supports the conclusion that the above interpretation, which promotes a fast

determination of liability and permits the UEF to timely collect its debts, was the intent of the Legislature at the time the statute was written.

In regards to the WCC's decision regarding casual employment, *Colmore* reaffirmed the "vague and shadowy" nature of the casual employment determination, but it also set forth three factors which aid a court in that determination: (1) the nature of the employer's business related to the injury; (2) whether the employee was working in furtherance of that business; and (3) whether the employer had a profit motive in relation to that business. *Colmore*, ¶¶ 22, 29-31. All of these factors must go into the Court's case-by-base analysis of "what is and what is not employment in the usual course of trade, business, profession, or occupation." *See id.*, ¶ 22. If Weidow's description of "profit motive" is accurate – that in order to have profit motive, actually making a profit is not required, then the reverse must also be true – accidentally receiving a negligible financial benefit does not necessarily mean one has a profit motive. Such was the case with Howard. Howard's receipt of a very minor benefit from accidentally incorrect tax filings cannot alone establish he possessed a profit motive connected to his ownership and development of his Montana vacation home. Applying the facts of this case to the *Colmore* factors, this Court must conclude that Howard's employment of Weidow to finish the work on his Montana vacation home was not

in his usual course of business, and that Weidow therefore fell under the casual employment exception of worker's compensation coverage.

ARGUMENT

I. Section 39-71-520, MCA (2005), Is Neither Unconstitutionally Vague Nor Ambiguous.

The question of jurisdiction is always primary in importance and must be considered prior to any other legal argument, for "[o]nce a court has determined that it lacks subject-matter jurisdiction, . . . the only further action it can take is to dismiss the case." *Lurie v. Blackwell*, 285 Mont. 404, 409, 948 P.2d 1161, 1164 (1997). Therefore, because Weidow's failure to appeal to the WCC within the 60-day statutory time period prescribed in § 39-71-520(2)(c), MCA is jurisdictional, the Court must consider this issue first.

A. Howard has not raised any "new" issues on appeal and is permitted to argue jurisdiction at this time.

Weidow points out that Howard did not participate in the briefing of the UEF's motion to dismiss based on his failure to abide by the statutory time requirements set forth in § 39-71-520(2), and asks the Court to limit Howard to the arguments presented to the WCC by the UEF. Howard recognizes that this Court "considers issues presented for the first time on appeal to be untimely and will not consider them." *Molnar*, ¶ 11. However, Howard has not raised any issues or arguments which were not contained in the UEF's briefing or arise directly from

the WCC's Order. Therefore, Howard's arguments regarding the constitutionality, and, for that matter, the lack of ambiguity, of § 39-71-520(2) do not contravene the Court's rationale behind this rule, *i.e.* its refusal "to fault a trial court 'for failing to rule correctly on an issue it was never given the opportunity to consider.'" *Id.* (citation omitted).

The argument in Howard's Opening Brief regarding the constitutionality of § 39-71-520(2) first discusses the WCC's failure to apply the proper legal standard to evaluate constitutional challenges. This argument arose directly from the WCC's reasoning and could not have been raised by the UEF in the court below. The same can be said of Howard's discussion of the reasonableness of the UEF's construction of the statute. This reasonableness argument developed out of the WCC's conclusion that "§ 39-71-520(2), MCA, has at least two reasonable interpretations. . . ." Dec. 31, 2008 Order, ¶ 21 (Op. Br. App. 1). Additionally, Howard's argument regarding the statute's clear and unambiguous nature and the meaning of its plain language was raised in the first instance by the UEF in its reply brief to its motion to dismiss. Weidow Response Br., App. F, UEF's Reply, at 2-3. Accordingly, all of the arguments contained in Howard's Opening Brief, and all of the arguments in this Reply, are properly raised in this appeal.

B. The WCC's conclusion that § 39-71-520, MCA (2005), is unconstitutionally vague was incorrect.

As Howard maintained in his Opening Brief, the WCC did not give the appropriate deference to the presumption of constitutionality afforded to all statutes. *Oberson v. U.S. Forest Svc.*, 2007 MT 293, ¶ 14, 339 Mont. 519, 171 P.3d 715 ("We presume that 'all statutes are constitutional, and we attempt to construe them in a manner that avoids unconstitutional interpretation.'") (citation omitted). The statute's plain language is clear and unambiguous, rendering any finding of unconstitutional vagueness improper. *See Wing v. State*, 2007 MT 72, ¶ 12, 336 Mont. 423, 155 P.3d 1224 (holding a statute "is unconstitutionally vague if a person of common intelligence must guess at its meaning"). On this basis alone, this Court should reverse the WCC's Order.

Should the Court disagree and find more than one interpretation of § 39-71-520(2) is reasonable, however, a reversal is still required. As Weidow's own argument addressing the "beyond a reasonable doubt" standard illustrates, when there is more than one "reasonable" interpretation of a statute, the statute cannot be found unconstitutionally vague. Weidow states he "does not believe he should have to prove the statute unconstitutional 'beyond a reasonable doubt'" because "neither party should have such a burden of proof" when "two interpretations [of the statute] are reasonable." Weidow Response Br., at 39-40. However, the case law clearly states "a term is not vague simply because it can be dissected or subject to different interpretations. This Court is required to uphold the constitutionality of

a statute when that can be accomplished by a reasonable construction of the statute." *Montana Media, Inc. v. Flathead County*, 2003 MT 23, ¶ 58, 314 Mont. 121, 63 P.3d 1129 (citation omitted) (emphases added). Accordingly, Weidow's own arguments establish the WCC's conclusion that § 39-71-520(2) is unconstitutionally vague are incorrect and must be reversed.

C. Section 39-71-520, MCA (2005), is not ambiguous.

Weidow argues this Court should avoid the constitutional issue raised by the WCC's Order entirely by deciding § 39-71-520(2)(c)'s 60-day time limit to file with the WCC is ambiguous, and therefore void as applied to him. While this Court avoids constitutional issues where possible, *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 165 P.3d 1079, ambiguity does not provide an alternative basis for the WCC's ruling.

i. The plain language of the statute is clear and unambiguous.

Once again, § 39-71-520, MCA (2005) states the following:

> **39-71-520. Time limit to appeal to mediation – petitioning workers' compensation court – failure to settle or petition.** (1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the **determination by the department** or the **determination** is considered final.
>
> (2) (a) If the parties fail to reach a settlement through the mediation process, any party who disagrees with the **department's determination** may file a petition before the workers' compensation court.

(b) A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-2411 unless the parties stipulate in writing to a longer time period for filing the petition.

(c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the **determination by the department** is final.

§ 39-71-520, MCA (2005) (emphases added).

The Court's "purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will." *State v. Johnston*, 2008 MT 318, ¶ 26, 346 Mont. 93, 193 P.3d 925, *overruled on other grounds*, *State v. Maynard*, 2010 MT 115, ¶¶ 21 & 28, --- Mont. ---, --- P.3d ---. In statutory construction, Montana courts are bound by the mandate that

> the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

§ 1-2-101, MCA; *see also Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487. When interpreting a statute, this Court first looks to its "plain language, and if the language is clear and unambiguous no further interpretation is required." *Johnston*, ¶ 26. Here the plain language of § 39-71-520(2) is unambiguous and establishes "determination by the department" to mean the initial decision by the UEF. This is reinforced by the repeated use of the complete phrase and the single word "determination" throughout § 39-71-520 to refer to the UEF's decision, and not the mediator's recommendation.

The plain language of the statute is only subject to one reasonable interpretation. The statute employs the word "determination" four separate times. As § 1-2-101, MCA, states, where there are several provisions within a single statute or statutory scheme, a judge must construe that provision or term to give effect to all of them. "We read all parts of a statute as a whole and strive to give effect to all of its provisions." *Shelby Distributors, LLC v. Montana Dep't of Revenue*, 2009 MT 80, ¶ 18, 349 Mont. 489, 206 P.3d 899.

Likewise, the long-accepted rule of statutory construction, *noscitur a sociis*, which calls for the Court to ascertain "the meaning of a word by referring to the meaning of words associated with it," requires the Court to apply the same meaning to all uses of the phrase "determination by the department" within § 39-71-520. *See Barnes v. Montana Lumber & Hardware Co.*, 67 Mont. 481, 216 P. 335 (1923) ("'It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments and statutes.'") (citation omitted).

The phrase "determination by the department" is used first in § 39-71-520(2)(a) to describe the initial decision by the UEF, prior to any appeal to a mediator. "Determination" is used to refer to that initial determination throughout the statute. Accordingly, the plain language of the statute, examined using

common rules of statutory construction as described above and in Howard's Opening Brief, is not ambiguous and clearly evinces the intent of the Legislature: The Legislature intended the UEF's determination to become final if a party fails to appeal to the WCC within 60 days of the mailing of the mediator's report.

ii. The legislative history establishes the legislature's intent that the "determination of the department" meant the UEF's decision, not the mediator's recommendation.

Should this Court find the statute is ambiguous, however, the Court must look "to the structure, purpose and/or legislative history of a statute to determine the intent of the Legislature." *Johnston*, ¶ 26. These elements likewise support the interpretation above. In its reply brief to its motion to dismiss, the UEF noted the written testimony from Jerry Keck of the UEF explained the legislative purpose behind § 39-71-520(2)(c): to "set[] a 60-day time limit for filing a petition in the workers' compensation court after the mailing of a mediator's report. This is important to move the case to a legally binding determination that the employer is liable for the debt so the Department can seek to collect it." Weidow Response Br., App. F, UEF's Reply, Ex. D, at 2. This history shows the policy behind the statute was to give the UEF a fast and definitive deadline either to defend its determination or to seek reimbursement for its expenses, and it supports the most reasonable interpretation outlined above.

The Legislature's recent amendment of the statute, referenced in Weidow's Response, is irrelevant in interpreting the 2005 version of the statute. It is the Court's duty, and not the Legislature's, to determine "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). This amendment does not therefore establish a fatal legal ambiguity of the previous version. However, should the Court choose to consider the recent amendment, it further supports the reasonable interpretation argued by Howard. As the recent legislative history provided by Weidow illustrates, it shows that the Legislature simply addressed the language in reaction to the WCC's flawed interpretation of § 39-71-520(2)(c). *See* Weidow's Response Br., App. E. Moreover, if anything the Legislature's recent amendment illustrates the Legislature's intent from the beginning: "A mediator's report is not a determination by the department for the purposes of this section." § 39-71-520(2)(d), MCA (2009).

Similarly the public policy as exhibited by the Legislature's imposition of short deadlines for UEF cases, along with this Court's and the WCC's own enforcement of its time deadlines against all parties, claimants and the UEF alike, supports the conclusion that a party's obligations to timely dispute an adverse determination of benefits should be strictly construed. *See, e.g.*, *Colmore*, ¶¶ 39-42; *Auchenbach v. UEF*, 2006 MTWCC 13, ¶¶ 6-8, 21; *see also* Weidow's

Response Br., App. D (legislative history of 1995 amendment to § 39-71-520(2) imposing 60-day statutory deadline).

For all the reasons stated above, this Court should reverse the WCC's Order. § 39-71-520(2)(c), MCA (2005) is not unconstitutionally vague, nor is it ambiguous. Instead, its plain meaning clearly states that a failure to file an appeal with the WCC within 60 days of the mailing of the mediator's report renders the UEF's original determination, the "determination by the department" final. Accordingly, Weidow untimely filed his petition with the WCC and his claim must be dismissed.

II. Weidow's Employment with Howard Was "Casual."

A. *Colmore* firmly established the importance of multiple factors in the determination of "casual employment."

This Court in *Colmore* reinforced the "vague and shadowy" nature of the casual employment determination, emphasizing that it must be undertaken on a case-by-case basis. *Colmore*, ¶ 22. However, the Court also identified important factors for courts to consider when determining whether a claimant's "employment [is] not in the usual course of the trade, business, profession, or occupation of the employer." § 39-71-116(7), MCA. One factor the Court discussed in *Colmore* was the employer's business purpose in regards to the property where the work injury occurred. *Colmore*, ¶ 29 ("Colmore leased the property from his limited partnership for the express purpose of running an agricultural business."). Another

was whether the employee was hired to work for the employer in furtherance of that business. *Id.*, ¶ 26 ("The important fact is that Forgey was employed to work for Colmore in the course of his agricultural business. . . ."). A third factor was whether the employer possessed a profit motive in relation to that particular business. *Id.*, ¶¶ 27-28 ("Therefore, even though he did not make a profit running the ranch, he did operate the ranch with a profit motive in mind – that of reducing his overall income tax through the business expenses he incurred while operating the ranch."), ¶ 31 ("Perhaps most significantly, Colmore deducted $140,983 from his federal income taxes, in 2000, based on the agricultural deductions and depreciations claimed for both his Montana and Tennessee farming operations.").

Regardless of Weidow's assertions to the contrary, all three of these factors must be considered when determining whether an employee qualifies as "casual" under § 39-71-116(7), MCA.

B. The WCC did not properly apply the facts of this case to the law as set forth in *Colmore*.

Focusing on Howard's profit motive alone, Weidow argues the WCC relied on substantial credible evidence to find Weidow was not a casual employee under the Act. As established above, more factors than simply profit motive go toward the casual employment evaluation. However, and more importantly, evidence consisting of two years of Howard's tax returns, which Howard has admitted contained errors, is not alone sufficient to establish profit motive. Instead, this

Court must examine all of the evidence to determine whether these tax returns alone provide "substantial credible evidence" to establish profit motive.

As Howard demonstrated in his Opening Brief, the vast majority of evidence, both documentary and testimonial, supports the conclusion that he did not have a profit motive in relation to his Montana vacation home. Numerous fact witnesses credibly and unequivocally testified that Howard at all times relevant to this appeal conducted himself in a manner consistent with an intention for the Montana vacation home to be a family home he intended to pass on to future generations, and that it was never intended to be sold or rented for profit or to otherwise generate income.

Moreover, Howard's 2006 tax return, on which the Montana vacation home appeared on Schedule A, serves as evidence of his continued lack of profit motive related to the property. Weidow asks the Court to discount this change in Schedules because it occurred after this litigation commenced. However, (1) both Howard and his accountant, Mr. Becker, testified that Mr. Becker placed the property on Schedule E in 2004 and 2005 improperly and mistakenly, and that the 2006 change was an effort to correct the mistake; (2) Howard's transfer of the property from Schedule E to Schedule A during litigation – when there is heightened scrutiny of his tax returns – is evidence of his continuing lack of profit motive; and (3) Mr. Becker would not have permitted Howard to transfer the

property to Schedule A if he actually had a profit motive. *See White v. Comm. Of Internal Revenue*, 227 F.2d 779, 779 (6th Cir. 1955) (a party without a profit motive cannot deduct business expenses on a federal income tax return) (cited in *Colmore*, ¶ 32). Howard's prior filings, whether intentional as Weidow asserts or merely negligent, are not the sole indicators of Howard's intention in regards to his Montana vacation home. Furthermore, that the property development expenses were never taken as itemized business deductions, it remained a vacation home, was never rented out, and was never built for resale, are additional and undisputed indicators that Howard never had a profit motive for the vacation home.

Howard is not asking the Court to ignore his 2004 and 2005 tax returns. Howard is asking the Court to examine all of the evidence to determine the existence of a profit motive, which under *Colmore* is only one element to be considered when determining whether Weidow's employment at Howard's Montana vacation home when he was injured was in Howard's usual course of business. Howard submits the presence of the vacation home on Schedule E of his 2004 and 2005 tax returns does not definitively establish he had a profit motive related to the property. Likewise, a violation of the federal tax laws, whether intentional or not, does not definitively establish Howard's intent in regards to the property or his profit motive. The WCC erred when it considered this evidence as

solely determinative of the casual employment exception to workers' compensation coverage.

Howard asks this Court to examine all of the relevant evidence related to profit motive when making its casual employment determination. Once it does so, this Court will conclude the tax returns alone do not amount to "evidence that a reasonable mind might accept as adequate to support a conclusion" that Howard's Montana vacation home was part of his usual course of business. *Liberty Northwest v. Montana State Fund*, 2009 MT 386, ¶ 13, 353 Mont. 199, 219 P.3d 1267.

Finally, Weidow's attempt to prejudice this Court against Howard by calling him names, falsely accusing him of purposely violating the law, and emphasizing the amount of money which could have resulted from depreciating the Montana vacation home on a yearly basis is not well taken. Howard's tax returns speak for themselves, and his income and any imaginary deductions which-could-have-been-and-were-not are completely irrelevant. While Howard, like the employer in *Nelson v. Stukey*, 89 Mont. 277, 300 P. 287 (1931), does own some rental properties and is otherwise engaged in the business of managing properties, the Montana vacation home – the only relevant property here for the Court's determination – was not ever intended to be and is not among them. Weidow was injured while laboring on Howard's Montana vacation home, not on any of

Howard's rental properties. He was not working in furtherance of Bradley Howard's business or in furtherance of any of the rental properties associated with the Howard Family 1995 Trust. He was not injured and never worked on Howard's Big Sky condominium or the airplane. Applying these facts to the law as established in *Colmore*, this Court should conclude Weidow falls under the casual employment exception to worker's compensation coverage and should reverse the WCC's holding otherwise.

CONCLUSION

For the foregoing reasons, Howard respectfully asks the Court to reverse the WCC.

Dated this 12th day of July, 2010.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

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CERTIFICATE OF MAILING

I hereby certify that on the 12th day of July, 2010, I mailed a true and correct copy of the above and fore going Appellant's Reply Brief, by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellant's Reply Brief, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 3,936 words.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.